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THE PROPOSED LAW GOVERNING EXPERT TESTIMONY.

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To the Editor of THE PHILADELPHIA MEDICAL JOURNAL:—

IN the PHILADELPHIA MEDICAL JOURNAL of May 13 there is an editorial upon a proposed Act of Assembly, published in the *Legal Intelligencer* of January 7, we believe, as a suggestion from Law Reform Committee of the Pennsylvania Bar Association, relative to expert or opinion testimony. The source from which this proposed act emanated is such as to require very careful consideration of the bill on the part of those interested. After such consideration it is to my thinking clear that the enactment of the bill as published would leave the situation in our courts, at least so far as medical matters are concerned, worse rather than better. My own belief is that the attempt at reform is in the wrong direction, but this is of course a matter ever open to discussion. On the other hand, it seems to me possible to point out the deficiencies of the bill so clearly that they will be universally recognized.

The first section of the bill is directed to providing for the appointment of 4 experts, who are to be paid by both parties directly or indirectly, and are supposed therefore to act without bias. Section 1, *inter alia*, states "Nor may any person be so chosen [as expert] if he has been approached or consulted or paid in reference to such proceeding or to the subject under inquiry by or on behalf of either party. Nor may he be so chosen if he has already formed a fixed opinion concerning the right or the guilt of either party to such proceeding or concerning the existence of some material fact relevant to such right or guilt." Let us see how this would apply in medicolegal matters.

Take first a case of supposed poisoning. Until the chemist has done his work there can be no trial, and in a large

proportion of cases until the chemist has done his work there is not sufficient ground for any legal proceedings save for that of investigation by the District Attorney's office. It is suspected that A has died of poisoning—the proper portions of the corpse are put in the hands of the chemist; if he finds the poison then it is the duty of the District Attorney's office, if possible, to connect the poisoning with some person; until, however, such connection is definite there can be no trial and no agreement between two parties. Under the proposed law the expert testimony of the chemist would be ruled out at the trial, and the whole judicial system would collapse. It will not do to say the law could be evaded by declaring that the chemist's testimony is as to matter of fact, not as to matter of opinion. The line between matters of fact and matters of opinion is largely arbitrary; it may be a matter of fact whether a certain stain upon a piece of glass is or is not arsenic, but so far as the expert is concerned it is a matter of opinion with him that this is arsenic. His opinion concerning the alleged fact is certainly open to contradiction, and if he be emyloyed by one party as an expert, the other party would necessarily have the right to employ somebody else as an expert to test the accuracy of his opinion.

Again, in regard to testamentary capacity. I suppose every expert in mental diseases is from time to time consulted as to the mental capacity of persons who are about to make wills; and under such circumstances written opinions are often put in the safe-deposit boxes with the will. It is absurd to say under these circumstances that the expert is under a bias; he gives the opinion and the will is made, if the opinion is that there is testamentary capacity; while the will is not made if the opinion of the expert is contrary. Death comes perhaps 5, 8, 10 or even more years after the making of the will; in the trial, under the purposed law, the expert who examined the patient at the time of the making of the will, and really had knowledge of the facts of the case, would be put aside for one who must give his decision without personal knowledge, basing his opinion upon the shadowy statements of interested relatives, servants, and other more or less cultivated or ignorant witnesses, who are themselves more or less involved in what may be a very bitter controversy.

Again, take the matter of the most contested of all judicial matters, personal injuries. I suppose almost every expert has been consulted shortly after an accident conjointly by the railroad that has done the injury and the person who has received the injury; has given an opinion to each party, receiving half a fee for the opinion from each party; and then the parties concerned disagreeing as to the amount of damages, the case has been taken into court. It is plain that the opinion of such an expert would be of much more value than the opinion of an expert of equal intelligence, who would examine the patient simply at the time of trial.

Some years ago I was employed by the City of Philadelphia to examine a woman, of whom it was affirmed that she had been permanently injured by falling into a hole in the street. Careful examination and study of the case led me to the positive conclusion that the woman was suffering from no disability, and to a belief that there had not been any injury. Notwithstanding decided testimony in accordance with this conclusion, $1,500 was awarded to the woman, the legal officers of the City expressing, however, great satisfaction, since they believed damages for thousands of dollars would have been given if it had not been for my testimony throwing doubt into the minds of the jury. Some years afterward, coming out of the court-room, I was met by a lawyer, who said, "Doctor, do you remember such and such a case?" I said, after some little hesitation, "Yes." He said, "The woman is dead now, and I think you will be gratified to know you were perfectly right. The case was a set-up one, the woman never had had any fall, never was hurt, but after all we were smart enough to get $1,500 from the City in spite of you."

A great deal of medicolegal work is in the investigation of such cases as these; very commonly the discovery of the truth involves the coaxing of the patient to go into a hospital, the putting of a trained nurse in the house, or the use of the professional detective, the alleged symptoms being of such a character that they cannot be seen by the doctor in examination. The medical expert, who had detected such a fraud as this, would, under the proposed bill, be entirely ruled out of court. In many cases of fraud, the detection at a single examination, such as would be made by experts appointed at the time of trial, is almost impossible.

Again, let a case of alleged malpractice be considered; or almost any medical case. If an expert has been called early in the case, has watched the case through, has perhaps known the patient before and after the occurrence, he is the one who has the most intimate knowledge of the whole affair; and yet, under the Act he certainly would be ruled out of court.

It must be clearly remembered, as before said, that in expert matters there is no line between matters of fact and matters of opinion; it is always a matter of opinion what are the facts of the case. Myelitis and broken backs are facts, but it is an opinion whether they exist in a given case or not.

Section 3 of the proposed Act says plainly that no expert or opinion testimony may be offered by either party except that of the official experts. Section 8 of the proposed law provides that no hypothetic question shall be submitted, but that the opinion of the expert witness must be based "either upon agreed or undisputed facts, or upon facts known by the witness and previously testified to by him, or upon the entire consistent evidence of a party or a witness, assuming the evidence to be true, or upon the several aspects of such evidence, assuming first one aspect and then another aspect to be true, or upon a combination of all or of any of the foregoing matters."

The difficulty of applying these sections to some medico-legal cases seems to me quite apparent. Supposing that this bill were enacted into a law, and that it were possible under its provisions to have a trial for poisoning; the official experts would find themselves in this position: the prosecuting District Attorney claims that a certain substance was arsenic; the defence claims that it was not arsenic; the conviction or acquittal would result according as the case put forth by the District Attorney or that set up by the defence was believed. The experts could not give any opinion in regard to the final matter under the provisions just given by the law because they could only give an opinion based upon one set of the alleged facts, and if they did give a decision based upon the whole testimony in the giving they would usurp the position of the jury, deciding as to matters of alleged fact. What good to the jury would be the statement of an official expert that if the case of the prosecution be correct

the substance is arsenic; but that if the statement of the defence be correct the substance is not arsenic? What the jury wants is guidance from an expert as to whether the substance is or is not arsenic; and this brings us to the fact that probably, if it be possible in any way to reform expert testimony to advantage under the present jury system, such reform would consist in giving an expert assistant to the judge, who would expound to the judge the ins and outs of the expert testimony precisely as the judge expounds to the jury the ins and outs of the law in regard to other matters of evidence; the expert of course not addressing the jury directly but aiding the judge in the preparation of his charge.

Such considerations as those of the last paragraph are, however, perhaps of minor importance, since the purposed law, if enforced, would evidently altogether prevent cases of poisoning from getting to the jury.

A serious question is involved in the compensation of experts provided for under the bill. The giving of expert testimony is the most difficult branch of practice in medicine, involving the coexistence in the expert of the widest practical experience and the largest theoretic knowledge of the matters concerned; requiring also the highest judicial mental capacity and the greatest conscientiousness. No man is fit to give expert testimony on a medical matter who is not in daily active contact with all classes of the diseases in question. At the same time, the uncertainty of the engagements, the detentions in court, the amount of time involved in the proper investigation of cases, interfere very greatly with the regular duties of the doctor. Moreover, to most men few things are more disagreeable than to be made a target for the wit and the abuse of a man whose training has been largely directed toward the baffling of witnesses and the hiding or the bringing to light of the truth, according as his present needs lead him to desire. Under such circumstances expert testimony of really high order must be well paid for, and unless the payment is liberal the work will be done solely by very inferior men, and for the cause of justice would better be left undone than done. A recent adventure of mine indicates very strongly what would be the probable outcome of payment by courts in the country districts. The matter was a difficult case of alleged insanity;

three or four afternoons were given to its consideration; but the court finally held that $10 was a full remuneration for the expert.

A study of Section 10 of the proposed law, concerning the compensation of experts, will show further that in criminal cases the expert would never know whether he would get anything for his work or not. Unless the judge intervened his only claim for compensation would be an order upon a convicted defendant, to be enforced as part of the sentence. Exactly how much and what the convicted thief or assaulter would be willing and able to pay remains uncertain, but certainly few experts of eminence would be strongly tempted to follow such an ignis fatuus; if they did, one or two mirings would probably afford sufficient experience.

There are other objections to the proposed law which could be readily brought forward, but it does not seem here well to occupy more space. Instead of attempting to reform jury practice as it now exists, would it not be wiser to begin to limit trial by jury to subjects which are not absolutely outside of the normal horizon of the jury's vision? For example, a very large proportion of the medical expert difficulties could be solved by a simple law which said that no question of sanity or insanity should be referred to the ordinary jury, but to a commission composed of one lawyer, one doctor, and one layman (representing by its composition the three points of view), which commission should decide finally upon the question of sanity or insanity after hearing the evidence, both ordinary and expert. In the case of an alleged criminal the Commission should make the first investigation; if the sanity of the alleged criminal were upheld he should appear before the petit jury for trial as to guilt or innocence. If, however, the criminal were adjudged insane, he should become the ward of the court, to be taken care of according to the character of his crime and of his insanity.